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NOS. 82-1860 and 82-1862

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

PROSSER'S MOVING AND STORAGE COMPANY,
a Missouri corporation,
Petitioner,

and

SCHNEIDER MOVING AND STORAGE COMPANY,
Petitioner,

vs.

LORAN W. ROBBINS, et al., TRUSTEES OF THE CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION AND HEALTH AND WELFARE FUNDS,
Respondents.

TRUSTEES' CONSOLIDATED BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI TO THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

Since they are not parties to the collective bargaining agreement and do not have direct access to its grievance mechanisms, may the trustees of employee benefit funds, as fiduciaries under ERISA and as third-party beneficiaries of the labor agreement, proceed directly to court to collect delinquent contributions and to compel audits of contributing employers' records even though these employers allege that their disputes with the funds require interpretation of the collective bargaining agreement and therefore prior arbitration?

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TRUSTEES' CONSOLIDATED BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI TO THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENTS' STATEMENT OF THE CASE

Petitioners are public movers operating in and around St. Louis, Missouri. Respondents are the Trustees of the Central States, Southeast and Southwest Areas Pension and Health and Welfare Funds, two of the largest Taft-Hartley multiemployer employee benefit funds in the United States. For all times relevant to the underlying lawsuits, Prosser and Schneider were parties to collective bargaining agree-

[1] Respondents are: Loran W. Robbins, Marion M. Winstead, Harold J. Yates, Robert J. Baker, Howard McDougall, Thomas F. O'Malley, and R.V. Pulliam, Sr., Trustees of the Central States, Southeast and Southwest Areas Pension and Health and Welfare Funds. Thomas F. O'Malley has been replaced by Arthur H. Bunte, Jr. Earl L. Jennings, Jr. is also a Trustee.

ments with Local 610, affiliated with the International Brotherhood of Teamsters. These agreements required Prosser and Schneider to make specified weekly contributions to the Central States Funds on behalf of all persons covered by the agreements (Appellants' Brief, pp. 5-10).

In March, 1977, and again in May, 1979, Central States conducted an audit of Schneider and rebilled the company. On both occasions, Schneider ignored the audit findings and the Funds' rebilling, contending that the company had paid what it thought it owed (Appellants' Brief, pp. 17-18). In April, 1980, the Trustees filed an action to collect the delinquencies assessed against the company. Schneider filed a Motion to Dismiss on the grounds that the alleged delinquencies sought to be collected involved employees who were not covered by the collective bargaining agreement, and that the Trustees had no standing to bring the action until the contract was interpreted through the appropriate grievance mechanism.

The collective bargaining agreement in question did not permit *the Trustees* to invoke the grievance clause, notwithstanding the fact that problems of interpretation might be involved in a claim against the company (Appellants' Brief, pp. 15-16). Nor could the employer invoke it. Nevertheless, nothing in the record indicated that Schneider had ever attempted to discuss its "coverage" problems with the Union although "coverage" disputes with the Trustees existed since the first audit.

Only the Union could set the grievance mechanism in motion. Significantly, by the time Schneider filed a Motion to Dismiss the Trustees' collection action on account of their failure to exhaust intracontractual remedies, the Union had already been decertified for more than a year; moreover, the collective bargaining agreement had expired (Appellants' Brief, pp. 17-20).

The gravamen of the Trustees' Complaint against Prosser was that Prosser refused to permit an audit of the company's "pertinent records" as specified in the Trust Agreements governing the Health and Welfare and Pension Funds. Although Prosser's collective bargaining agreement expressly incorporated the Trust Agreements by reference (Appellants' Brief, pp. 14, 20-22), the company contended that the scope of the Trustees' administrative authority, as applied to it, required contractual interpretation. Hence prior submission to arbitration was necessary.

The District Court decided the *Schneider* and the *Prosser* cases on the same date, making no distinction between matters involving trust administration, as set forth in the operative Trust Agreements, and matters related to bargainable issues, such as coverage under the collective bargaining agreement (Appellants' Brief, pp. 14-15). It therefore dismissed both Trustee actions for the same failure to exhaust intracontractual mechanisms, notwithstanding the fact that the Trustees could not invoke the grievance mechanism of the collective bargaining agreement themselves and notwithstanding the fact that Prosser and Schneider were bound by Trust Agreements which expressly provided that actions taken by the Trustees were independent of any actions taken by the Union.

Recognizing that the Trustees would be dependent on the Union to invoke the grievance clause on their behalf, and that this would be inconsistent with national pension policy and recent decisions of this Court, a panel of the court of appeals reversed. Following a rehearing *en banc*, the court affirmed the panel decision by a majority of 6-2.

REASONS FOR NOT GRANTING THE PETITIONS

The decision of the Court of Appeals for the Eighth Circuit *en banc* is consistent with national pension policy and established labor law as interpreted by this Court and the courts of various circuits.

1. Introduction

By a 6-2 majority, the Court of Appeals for the Eighth Circuit *en banc* held that "trustees may come into court without first getting the union to invoke the machinery of arbitration" (A-19).[2]

This holding formed the conclusion of a relatively lengthy, well-reasoned opinion replete with references to statutory and judicial authority, including several of the most recent cases in which this Court dealt with the differences between Unions and employee benefit funds, mandated strict neutrality in trustee decision making, and rejected arbitration as an appropriate vehicle for the ultimate vindication of individual statutory rights. *United Mine Workers of America Health and Retirement Funds* v. *Robinson*, 455 U.S. 562 (1982); *NLRB* v. *Amax Coal Co.*, 453 U.S. 322 (1981); *Barrentine* v. *Arkansas-Best Freight System*, 450 U.S. 728 (1981).

The rationales of these cases do not support mandatory deferral to arbitration in the trustee-beneficiary context of ERISA and the LMRA, as the Eighth Circuit found. Without so much as mentioning these cases (*See* "Table of Authorities" in both Petitions), Prosser now contends that the Eighth Circuit decision is inconsistent with federal labor law and Schneider argues that the decision is also inconsistent with national pension policy. The fact is, however, that while employee benefit law is still in its genesis, two pronouncements from this Court have emerged with striking clarity: trust administration is qualitatively different from collective bargaining and trustees must function independently in order to fulfill the neutral fiduciary role Congress has assigned to them. *NLRB* v. *Amax Coal Co.*, 453 U.S. 322 (1981).

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[2] All references to the court of appeals' decision will henceforth follow the page numbers assigned to the case in Prosser's Appendix to the Petition (Appendix A).

The Eighth Circuit carefully examined policy questions articulated in these and other decisions of this Court.[3] It also analyzed "the relationship between unions and 302(c)(5) funds" (A-10). As a result of these considerations, the court of appeals not only decided the *Schneider* and *Prosser* cases in favor of the Trustees of the Central States Funds; it also substantially overruled three of its prior decisions mandating arbitration: *Farmer* v. *Fisher*, 586 F.2d 1226 (8th Cir. 1978); *Central States, Southeast and Southwest Areas Pension Fund* v. *CRST*, 641 F.2d 616 (8th Cir. 1981); and *Layne-Western Co., Inc.* v. *International Union of Operating Engineers*, 650 F.2d 155 (8th Cir. 1981). In support of these reversals, the court stated:

> *Stare decisis* is an important aspect of the judicial process, but sometimes it is more important to be correct than to be consistent. (A-10)

It is rare that a court of appeals *en banc* overrules its prior decisions in so prominent and decisive a manner. It would not have done so had it not been clearly persuaded of the correctness of its most recent holding in light of contemporary law. And, indeed, the correctness of the decision has been borne out. Notwithstanding a split of authority in the circuits (and therefore the possibility of choice) the Fifth Circuit recently followed the Eighth Circuit, finding "the Eighth Circuit's analysis more persuasive." *Bugher* v. *Consolidated X-Ray Service Corp.*, 705 F.2d 1426 (5th Cir. 1983).

The decision should stand since it is eminently correct. To the extent that a conflict in the circuits can still be said

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[3] The court also referred to the following Supreme Court decisions, finding them both relevant and persuasive in resolving the issue at bar: *Lewis* v. *Benedict Coal Co.*, 361 U.S. 459 (1960); *Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564 (1960); *Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960); *Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *Vaca* v. *Sipes*, 386 U.S. 171 (1967); *Allied Chemical & Alkali Workers* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971); *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974); *Kaiser Steel Corp.* v. *Mullins*, 455 U.S. 72 (1982).

to exist notwithstanding subsequent related decisions of this Court, it will shortly resolve itself as a "majority view" clearly emerges. Thus, review by this Court is not necessary.

2. Mandatory deferral to arbitration of routine matters of trust administration — audits and collections — does not promote trustee independence as required by Congress, this Court and the courts of various circuits.

In *United Mine Workers of America Health and Retirement Funds* v. *Robinson*, 455 U.S. 562 (1982), this Court confirmed that in enacting 302(c)(5) of the LMRA, Congress intended that benefit funds be completely independent of Union control. For this very reason, district courts have long refused to dismiss trustee collection actions for failure to exhaust the grievance mechanisms of collective bargaining agreements: *Wishnick* v. *One Stop Food and Liquor Store, Inc.*, 359 F. Supp. 239 (N.D. Ill. 1973); *Todd* v. *Casemakers, Inc.*, 425 F. Supp. 1375 (N.D. Ill. 1977); *Central States, Southeast and Southwest Areas Pension Fund* v. *Gratiot Oil and Gas Services*, 517 F. Supp. 811 (W.D. Mich. 1981). Indeed, prior to 1979, there was only *one single* reported instance of deferral, *IBEW, Local 308* v. *Dave's Electric Service*, 382 F. Supp. 427 (M.D. Fla. 1974).[4] Although *Dave's Electric* was a pre-ERISA case, it provided in its turn the principal judicial basis for the *only* circuit court opinion in *direct* conflict with the case at bar, *Central States, Southeast and Southwest Areas Pension Fund* v. *Howard Martin*, 625 F.2d 171 (7th Cir. 1980), *infra*.

ERISA did not alter this mandate of independence; indeed, 29 U.S.C. § 1105 makes "trustee responsibilities" nondelegable. And, if any actions can be regarded as falling within the scope of "trustee" or fiduciary responsibilities, it is the conducting of field audits to verify the accuracy of reporting and the filing of lawsuits to collect delinquent contributions. *See Rosen* v. *Hotel and Restaurant*

[4] Remanded on other grounds, 545 F.2d 987 (5th Cir. 1977).

Employees, Local 274, 637 F.2d 592 (3d Cir. 1981), *cert. denied*, 102 S. Ct. 398 (1981). Indeed, failure to collect delinquent contributions, except under very limited circumstances, is a prohibited transaction under 29 U.S.C. § 1106. *See* DOL and IRS Regulation 76-1 (41 F.R. 12740; March 26, 1976).[5]

Consistent with the goals of the LMRA and ERISA, which were designed to safeguard employee benefits, trustee independence in the area of audits and collections cannot be diluted through forced reliance on Unions whose interests may not always be consonant with those of the funds and over whom the trustees have no control. Indeed, such reliance cannot be reconciled with the fact that fund trustees stand completely outside of the collective bargaining process, are not the agents of those who appoint them, owe undivided loyalty to participants and beneficiaries, and must maintain strict neutrality with uncompromising rigidity. *See NLRB* v. *Amax Coal Co.*, 453 U.S. 322 (1981).

Mandatory deferral to an arbitration process which they cannot invoke places fund trustees in just such a position of involuntary reliance. As the Fifth Circuit recently noted: "By carelessness or deliberate refusal to act, the Union

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[5] Contributions owed to employee benefit funds are regarded as "fund assets." Thus, contributions owed but not paid constitute an "extension of credit between the plan and a party in interest," which is a prohibited transaction under ERISA (29 U.S.C. §1106(a)(1)(B)). In March, 1976, the DOL and the IRS created a class exemption from this prohibited transaction by permitting trustees to settle or compromise claims against delinquent employers for less than the full amount based on such factors as whether or not a judgment could be collected. The trustees' decisions in this regard would still be subject to challenge under the "prudent man" rule of ERISA. In granting this exemption, the DOL and the IRS relied on the fact that employee benefit funds have systematic procedures for collecting delinquent contributions and for reviewing employer accounts. Thus, the exemption was designed only for those cases in which application of full-scale collection procedures would not be prudent on a cost-analysis basis or for other reasons. The Regulation makes clear that trustees who do not take vigorous action to collect delinquent contributions are in danger of committing a prohibited transaction.

could completely thwart the Trustees' ability to administer and ensure payments to the trust funds. Though in full possession of their fiduciary duties, the Trustees could exercise their fiduciary powers only at the Union's discretion. Such a situation would completely violate the Congressional directive that control of fringe benefit funds shall not rest with the unions." *Bugher* v. *Consolidated X-Ray Service Corp.*, 705 F.2d 1426 (5th Cir. 1983).

In rejecting Petitioners' exhaustion argument, the Eighth Circuit did not rely solely on the bare text of Section 302(c)(5) of the LMRA and equivalent provisions of ERISA, and it did not indulge in legal abstractions. Referring instead to such decisions as *Allied Chemical & Alkali Workers of America, Local 1* v. *Pittsburgh Plate Glass Co., Chemical Division*, 404 U.S. 157 (1971), the court set forth several concrete and practical reasons why reliance on Unions to protect the interests of employee benefit funds and plan participants would be misplaced (A-16-18). Most importantly, the court observed that if money is limited, as it usually is, choices must be made and priorities established. In this situation, the Union's primary interest, quite properly, would lie in keeping as many of its members working as possible. Certainly, it would be reasonable for it to seek *first* to protect the wages of active members of the bargaining unit and *only then* to secure the retirement benefits of former employees or their families. As the court noted, the latter persons may no longer be members of the bargaining unit whom the Union has an affirmative duty to represent. Conversely, the trustees of employee benefit funds owe fiduciary obligations to *precisely* such persons.

Priorities based on economic necessities are perfectly legitimate. Thus, it is well-established law that the duty of fair representation does not prevent Unions from making economic decisions that have a discriminatory effect. *See United Mine Workers of America Health and Retirement Funds* v. *Robinson*, 455 U.S. 562 (1982). Indeed, recognizing that such decisions are legitimate, the Third Circuit

stressed why Union domination of a trust fund would result in precisely the kind of conflict of interest that Section 302(c)(5) of the LMRA was designed to prevent by requiring neutral and independent administration of Taft-Hartley funds. *Nedd* v. *United Mine Workers of America*, 556 F.2d 190 (3d Cir. 1977). Petitioners have not addressed any of these cases.

In the case at bar, the district court relied "largely" on *Central States, Southeast and Southwest Areas Pension Fund* v. *Howard Martin*, 625 F.2d 171 (7th Cir. 1980), as the Eighth Circuit pointed out in its reversal (A-2). So, naturally, do Prosser and Schneider in their Petitions.

In *Howard Martin, supra*, a panel of the Seventh Circuit decided that if a question of employee coverage under a collective bargaining agreement was raised, an employer could not be regarded as "delinquent" for the purposes of a trustee collection action until the contract was first interpreted through the appropriate grievance mechanism. In other words, the trustees could not go directly to court to have such contractual disputes adjudicated. (The issue in Howard Martin was whether "emergency" or "temporary" employees were "covered" by the contract and hence eligible for contributions.) Significantly, the court acknowledged that the trustees did not have access to the grievance mechanisms of the National Master Freight Agreement in question because the contract expressly provided that these mechanisms could be set in force "only by the authorized Union representative or by the employer." The court nevertheless rejected as meritless the Fund's contention that the trustees should not be required to exhaust mechanisms which they are not contractually empowered to invoke. The court stated:

> The argument falls of its own weight, however. To trigger the arbitration process, the Funds need only inform the Union, the members of which the funds exist to serve, that Martin disputes the coverage of certain

> workers and ask the Union, the organization of primary interest, to file a grievance against Martin.[6]

In so concluding, the Seventh Circuit not only ignored an express provision of the collective bargaining agreement, it also failed totally to examine the implications of its decision for the mandate of trustee independence.

Howard Martin was decided in July, 1980. As of October 13, 1982 when the Eighth Circuit *en banc* heard oral argument in the case at bar, no grievances had been adjudicated although delinquencies were still outstanding.[7] Thus, Respondents were not dealing in hypotheticals, as the dissent believed (A-23; Prosser's Petition, p. 12). The majority's concern that Unions cannot "be expected to act so readily in the fund's interests" (A-16), however legitimate the reasons may be, was borne out in this instance. In the case of Schneider, the Union was, in fact, *decertified* when the Trustees filed their collection action, a fact noted by the Eighth Circuit (A-4/17) but omitted from Schneider's "Statement of the Case" (Petition, pp. 2-4).

In sum, there is no authority to suggest that employee benefit funds or their trustees can compel Unions to arbitrate. The Union does not stand in a fiduciary relationship to the trustees as it does to the members of the bargaining unit

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[6] These statements are inaccurate. In the first place, Union membership is not a prerequisite for coverage under the collective bargaining agreement; an employee is "covered" and hence entitled to contributions based on hours of service performed in a job classification described in the contract. Moreover, the Union is not the organization of primary interest with regard to health and welfare and pension contributions. As noted above, contributions owed are fund assets not assets of the employer or the Union. When collected, these monies are pooled and invested on behalf of all participants and all beneficiaries of multiemployer plans, not on behalf of the members of a particular local Union or a particular employer. This is why trustees are commonly regarded as the proper party to bring collection actions, although the employer's obligation is established in the collective bargaining agreement. See *Lewis* v. *Quality Coal Co.*, 243 F.2d 769 (7th Cir. 1957).

[7] *See* Transcript of oral argument, p. 36, lines 8-13.

it represents. Thus, such cases as *Vaca* v. *Sipes*, 386 U.S. 171 (1967), or *Bowen* v. *U.S. Postal Service*, 459 U.S. ____, 103 S. Ct. 588 (1983), which delineate paths of redress available to employees who believe that their Union has failed them in the performance of its statutory duty of fair representation, are inapposite. Question II of Prosser's "Questions Presented" is not only ill-conceived; it is not buttressed by persuasive argument and should not be reviewed.[8] Significantly, *Howard Martin* was decided before *United Mine Workers* v. *Robinson*, *supra*, and before *NLRB* v. *Amax Coal Co.*, *supra*; *Robbins* v. *Prosser* and *Bugher* v. *Consolidated X-Ray Service Corp.*, *supra*, which reject the *Howard Martin* approach, were decided *after* these Supreme Court decisions. At the very least, *Howard Martin* conflicts with the mandate of trustee independence articulated in these more recent decisions.

3. Mandatory deferral to arbitration conflicts with national pension policy as articulated in ERISA and the MEPPAA.

In enacting ERISA, Congress sought to prevent the great personal tragedies that had occurred in the past when employees reached retirement age only to discover that the benefits they had worked for and expected were not available due, among other things, to improvident or careless trust administration. *See Nachman Corp.* v. *PBGC*, 446 U.S. 359, 374-375 (1980). Among the goals to be promoted by the new Act were the establishment of "standards of conduct, responsibility and obligation for the fiduciaries of employee benefit plans" (29 U.S.C. § 1001(b)).

Under ERISA, the trustees of such plans were given "exclusive authority and discretion to manage and control the assets of the plan" (29 U.S.C. § 1103), and "trustee responsibilities" were generally conceived to be "nondeleg-

[8] Question II states: If, in the foregoing instance, third-party beneficiary fund trustees are not required to defer litigation of their claims pending arbitration, must they, at the least, plead and prove that it would be futile to request the union to properly initiate and pursue arbitration of such questions of contract interpretation?

able" (29 U.S.C. § 1105). While the details of trust administration were to be set forth in mandatory written trust instruments (29 U.S.C. § 1102), the trustees were subject to an overriding statutory obligation to act "with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims" (29 U.S.C. § 1104(a)(1)(B)).

ERISA also requires pension funds to credit an employee with service toward the vesting of his benefits even where his employer never remitted corresponding contributions (29 U.S.C. §§ 1052(a)(3)(A)(C); 1053(b)(2)(A); 29 C.F.R. § 2530.220b-2(a)(1)(2). In other words, eligibility for benefits is a function of hours worked under a collective bargaining agreement and not a function of employer contributions.[9] An employee is "covered" by the collective bargaining agreement if he performs work in a job classification described in the contract. Union membership *is not* a prerequisite for coverage, *supra*, fn. 6.

In enacting ERISA, Congress clearly imposed upon the trustees of employee benefit funds a nondelegable fiduciary duty to take all reasonable steps to assure that contributions to the funds correlate with disbursements from them. Since employees cannot be estopped from asserting claims on the grounds that their employer did not make contributions as required by the collective bargaining agreement, trustee diligence in this area is particularly important to prevent a drain on fund assets. Systematic audits of employer accounts to verify the completeness and accuracy of reporting and vigorous action to collect delinquent contributions obviously further the goal of assuring that contributions and disbursements correlate.

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[9] The Department of Labor requires that credit be given "*solely on the basis of service performed for a participating employer, regardless of whether that employer...has made or defaulted on his required contributions.*" Advisory Opinion Letter, 31 August 1976, BNA *Pension Reporter*, No. 221, Jan. 8, 1979, R-24 (A-71) (emphasis supplied).

Conversely, mandatory deferral to arbitration, which requires Union intervention, impedes the trustees in the exercise of a basic fiduciary duty and also causes delay. It need hardly be said that delays in collecting delinquent contributions are inherently detrimental to employee benefit funds because of the risk of employer bankruptcies, a risk that is particularly great when economic conditions are uncertain.[10] Contributions owed but not paid are fund assets; however, employee benefit funds are both involuntary and unsecured creditors, and hence enjoy a very limited priority under the Bankruptcy Reform Act of 1978, 11 U.S.C. § 501, *et seq.*

The exhaustion doctrine is particularly inconsistent with national pension policy as reflected in the Multiemployer Pension Plan Amendments Act of 1980 (Pub. L. No. 96-364), an Act in which Congress undertook to make some fundamental revisions of ERISA.

ERISA did not cure the problem of delinquent contributions. Indeed, in the six years following its passage, the problem of delinquent contributions assumed such magnitude that Congress created a new and distinct cause of action for their collection (29 U.S.C. § 1145).[11] Moreover, to encourage correct reporting and to deter evasions, Con-

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[10] In *Howard Martin*, supra, the trustees brought a collection action in 1979. The Seventh Circuit required deferral to arbitration in July, 1980. As of October 13, 1982, no grievances had been adjudicated. Howard Martin is now involved in bankruptcy proceedings. *S.D.F. Inc., d/b/a Howard Martin* (IP83-1160-B, U.S. Bankruptcy Court, Indianapolis, Indiana, 1983).

[11] **§1145. Delinquent contributions**

Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

(Pub. L. 93-406, Title I, ¶ 515, as added Pub. L. 96-364, Title III, § 306(a), Sept. 26, 1980, 94 Stat. 1295.)

gress also designed stringent remedies, including double interest and mandatory attorneys' fees if the trustees prevailed in a collection action (29 U.S.C. § 1132(g)(2)).[12] Significantly, Congress *withdrew* from the Secretary of Labor his power to collect delinquent contributions (29 U.S.C. § 1132(b)(2)),[13] thereby placing the burden entirely on the trustees.

In passing the Amendments Act, Congress was not only concerned with designing more effective means for making employee benefit plans whole; it also expressly sought to streamline and simplify collection actions. In its *Prosser* opinion, the Eighth Circuit drew particular attention to this

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[12] 29 U.S.C. § 1132(g)(2) provides:

§1132. Civil Enforcement

(2) In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in favor of the plan is awarded, the court shall award the plan —

(A) the unpaid contributions,

(B) interest on the unpaid contributions,

(C) an amount equal to the greater of —

(i) interest on the unpaid contributions, or

(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),

(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate.

For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of Title 26.

(As amended Pub. L. 96-364, Title III, §306(b), Sept. 26, 1980, 94 Stat. 1295.)

[13] Section 1132(b)(2) provides:

The Secretary shall not initiate an action to enforce section 1145 of this title.

aspect of the Act's legislative history, citing two relevant statements made in or by the Senate and the House of Representatives: "[R]ecourse available under current law for collecting delinquent contributions is insufficient and unnecessarily cumbersome and costly." (Senate Comm. on Labor and Human Resources, 96th Cong., 2d Sess. 44, A-13); "Federal pension law must permit trustees of such plans to recover delinquent contributions efficaciously, and without regard to issues which might arise under labor-management relations law, other than 29 U.S.C. 186...,"[14] (126 Cong. Rec. 23039 (1980), A-13). Mandatory deferral to arbitration is inconsistent with the legislative history of the MEPPAA. As the Eighth Circuit correctly observed: "issues of arbitrability can be quite complex, and allowing them to be injected into trustee collection suits can frustrate this legislative purpose" (A-13, fn. 4).

Unlike Schneider, who allowed Respondents to conduct an audit and then simply ignored the audit results until a collection action was filed, Prosser resisted a fund audit and then attempted to inject arbitration into this area of trustee activity. The notion that an arbitrator may determine whether the trustees have a right to conduct audits, and, if so, to determine the scope of that audit, is particularly incongruous since audits are routine matters of trust administration,[15] exclusive to trustees under 29 U.S.C. §

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[14] Such issues would include structural violations (for example, unequal representation of labor and management on fund boards of trustees) or a fund's failure to operate pursuant to a written instrument specifying the basis on which contributions are made and monies disbursed. Congress did not contemplate that such defenses as exhaustion could be raised by an employer to delay a collection action initiated by the trustees of trust funds that otherwise comply with the Taft-Hartley Act (29 U.S.C. § 186(c)(5)).

[15] See Bogert, *Trusts and Trustees*, Chap. 46, *Accounting and Compensation* (2d ed. 1975). The trustees' right to determine the scope of an audit and to conduct it was rarely challenged prior to *Central States, et al.* v. *CRST*, supra. When it limited the scope of a trustee initiated audit in *Central States, et al.* v. *Central Transport*, 698 F.2d 802 (6th Cir. 1983), the 6th Circuit cited only *CRST*, as Central States pointed out in their "Petition for a Writ of Certiorari."

1103, and hence far removed from the sphere of bargainable issues likely to be reflected in a collective bargaining agreement which is the *only* agreement open to the arbitrator's interpretation.

There is no authority to suggest that an arbitrator may properly review trustees' interpretations of their own trust instruments with regard to any matter involving *trust administration*. Even the Eighth Circuit panel in *Central States* v. *CRST, supra*, did not suggest that the permissible scope of an audit was an arbitrable issue. Nor, indeed, did the Sixth Circuit in *Central States, Southeast and Southwest Areas Pension Fund, et al.* v. *Central Transport*, 698 F.2d 802 (6th Cir. 1983), to be discussed below. Moreover, such questions as the statute of limitations for audits and the possible estoppel effect of an NLRB decision involving the Union on a subsequent action by fund trustees are peculiarly matters of law to be resolved by courts, not arbitrators. Prosser, of course, believed otherwise (Petition, pp. 7-8).

The possibility that an employer could insist on submitting the audit provision of the Trust Agreements governing the Central States Funds to arbitration raises problems of towering proportion. As *Prosser* notes, the Central States Pension and Health and Welfare Funds are two of the largest Taft-Hartley employee benefit trusts in the United States (Petition, p. 13). Some 12,000 employers with employees in 40 states contribute to the two funds pursuant to thousands of collective bargaining agreements having different grievance mechanisms. The two Trust Agreements are incorporated by reference in these thousands of collective bargaining agreements and are hence made binding on employers and Unions.

Clearly, the Trust Agreements are not ordinary contracts, but are blueprints for the centralized administration of these vast trusts. Indeed, they can only be modified by the Trustees themselves pursuant to a specified amendment

process. Chaos would result if arbitrators throughout the country were permitted to construe the Trust Agreements and substitute their interpretations for those of the Trustees. The Eighth Circuit did not find that arbitration was an appropriate vehicle by which to test the scope of the trustees' administrative authority. Prosser's contentions have no merit and are inconsistent with orderly trust administration as contemplated by ERISA and the MEPPAA.

As a final point, Schneider argues that since Congress provided for the arbitration of disputes concerning withdrawal liability[16] in designing the MEPPAA (Petition, p. 16), the Eighth Circuit opinion is inconsistent with employee benefit law as manifested in *this* statute and is thus in conflict with "the Congressional policy favoring arbitration as a means of resolving disputes in this area." Rep. Frank Thompson, one of MEPPAA's principal sponsors, specifically addressed this point:

> The committees intend *that the role of the arbitrator under this Act will be similar to that of a judge applying applicable law to the facts presented, and not a mediator attempting to reconcile competing interests.* In arbitration proceedings under various labor laws, issues are often compromised, in part so as to avoid damaging ongoing relationships between management and labor. Unlike proceedings of that type, the proceeding contemplated by the committees is intended to resolve disputes, to the extent possible, in favor of one of the parties rather than in favor of compromise. Cong. Rec. H 7899 (House debate of August 26, 1980, emphasis supplied).

In point of fact, arbitration in the context of resolving withdrawal liability disputes mainly involves the application of complex and technical statutory formulae to closed

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[16] An employer's "withdrawal liability" is his share of a pension fund's unfunded vested benefits liability. Unfunded vested benefits liability is the amount by which nonforfeitable benefits exceed fund assets. When an employer withdraws from a multiemployer pension plan, withdrawal liability can be imposed for up to 20 years to fill the funding gap left by his departure (29 U.S.C. § 1381, et seq.).

transactions; it is not part of an ongoing process of collective bargaining; it does not serve to give added content to open-ended collective bargaining agreements; and it does not promote industrial peace, all of which functions earned the approval of this Court in the *Steelworkers Trilogy*. This argument falls of its own weight.

In sum, neither Schneider nor Prosser have produced any authority, controlling or persuasive, showing that mandatory deferral to arbitration is consistent with national pension policy.

4. Mandatory deferral to arbitration is not required by federal labor law.

Both Schneider and Prosser argue, with the dissent, that the majority opinion of the Eighth Circuit threatens to "erode" "pronouncements of the Supreme Court in the Steelworkers Trilogy" (A-20; Prosser Petition, pp. 14-15; Schneider Petition, pp. 6, 12). The *Steelworkers Trilogy*, however, does *not* support the principle of mandatory deferral, as the Eighth Circuit found (A-6/7).

In *United Steelworkers of America* v. *American Manufacturing Co.*, 363 U.S. 564, 570-571 (1960), this Court emphasized that arbitration is fundamentally "a creature of contract." That is why courts themselves must determine, as a threshold question, whether or not a particular claim or controversy lies, on its face, within the scope of a particular contract's arbitration clause.

The contractual nature of arbitration was stressed, further, in *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581-582 (1960). Here, this Court analyzed labor arbitration as a *method for reducing industrial strife* and characterized the grievance procedure as part of a continuous *process of collective bargaining*: "The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement." Consonant with *American Manufacturing*, *supra*, the Court cautioned that "a party cannot be required to submit to

arbitration any dispute which he has not agreed so to submit." In other words, "the arbitrator's construction" is something which has to be "bargained for." *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

This Court has *never* upheld the principle of mandatory deferral to arbitration. Thus, the Court indicated its willingness to examine a whole contract for evidence of an agreement to arbitrate in *Atkinson* v. *Sinclair Refining Co.*, 370 U.S. 238 (1962). And, in *Gateway Coal Co.* v. *United Mine Workers of America*, 414 U.S. 368 (1974), the Court observed, in essence, that public policy either in *favor* or *disfavor* of arbitration is secondary to *contractual language* as a manifestation of the parties' intent.

A further point to be noted is that binding arbitration has traditionally been accepted as the *quid pro quo* for no-strike clauses. *See Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448 (1957); *Boys Markets, Inc.* v. *Retail Clerks' Union, Local 770*, 398 U.S. 235 (1970).

This line of cases makes clear that the Eighth Circuit's decision in no way departs from national labor policy and is perfectly consistent with the teachings of the *Steelworkers Trilogy*.

The Trustees of the Central States Funds are *not* parties to the collective bargaining agreement; rather, they are third-party beneficiaries of the collective bargaining agreement in question. *Lewis* v. *Benedict Coal Co.*, 361 U.S. 459 (1960).[17] Thus, they have never "bargained for" or "ag-

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[17] Petitioners dismiss the Eighth Circuit's application of *Lewis* v. *Benedict*, supra, because of the different fact pattern at issue. However, the Eighth Circuit *clearly distinguished Lewis* v. *Benedict* from *Prosser and Schneider*, but noted, quite correctly: "And while Lewis alone may not be dispositive of Schneider's and Prosser's cases, it does refute their argument that the trustees, as third-party beneficiaries, are subject to the same defenses as could be asserted against a suit by the union." (A-6) While this Court held that fund trustees cannot prevail if the underlying contract is *illegal*, it did not undo the basic proposition established in *Lewis* v. *Benedict*, namely, that benefit fund trustees are unusual third-party beneficiaries and not subject to ordinary third-party beneficiary law. *See Kaiser Steel Corp.* v. *Mullins*, 455 U.S. 72 (1982).

reed" to abide by an arbitrator's construction of the collective bargaining agreement, let alone an arbitrator's construction of the Trust Agreements from which their contractual powers derive. Finally, as this Court made unambiguously clear in *NLRB* v. *Amax Coal Co.*, 453 U.S. 322 (1981), employee benefit fund trustees stand *completely outside* of the collective bargaining process and are not the "representatives" of the labor and management groups that appoint them. Thus, mandatory deferral will have no effect on stabilizing industrial relations or serve any of the other purposes delineated in the *Steelworkers Trilogy*.

Both Petitioners nevertheless express concern that, absent mandatory deferral, employers will be caught between two tribunals, and may be subject to differing interpretations of the same collective bargaining agreement, which will prejudice labor relations (Schneider Petition, pp. 12-14; Prosser Petition, pp. 13-15). This contingency is remote. Given the cost of arbitration (as the Eighth Circuit noted), it is unlikely that a Union would file a grievance on behalf of a fringe benefit fund when that fund has itself already filed suit in federal court. Conversely, if the Union has filed grievances expeditiously, the Trustees might well await a decision concerning "coverage under the collective bargaining agreement" before filing a collection action involving the *same* controversy.[18] (Schneider's concern is also somewhat disingenuous, considering the fact that *it* never even tried to reconcile disputed questions of coverage with the Union. Rather, a year and a half after it received the results of a fund audit, and ignored them, it filed a Motion to Dismiss the Trustees' claim for delinquent contributions on the grounds that the Trustees had failed to exhaust the intracontractual grievance/arbitration mechanism!)

Moreover, employers would not necessarily be subject to differing interpretations of the same collective bargaining

[18] The trustees would still be subject to a nondelegable duty to collect contributions. Thus, the decision to await an arbitration award would involve a consideration of all relevant facts and circumstances, including the risk of delay.

agreement should they become involved in proceedings in two forums. As the Eighth Circuit noted, there is nothing preventing courts from carefully considering the interpretations of an arbitrator (A-19); nor would an arbitrator be prevented from weighing the constructions of a court.

It cannot be overemphasized that the issue sought to be reviewed is whether Trustees can be *compelled to proceed to arbitration absent any contractual basis for mandatory deferral*. To prevent the possibility of having to litigate in two forums, parties to collective bargaining agreements could grant the trustees *direct* access to contractual grievance mechanisms and make arbitration a condition precedent to litigation *if* bona fide coverage questions are involved. This would at least release the Trustees from enforced reliance on the Union.[19]

Schneider notes that the Eighth Circuit's opinion would prevent the Union from ever becoming a party to a trustee collection action (Petition, p. 13). There is no authority to suggest that the exhaustion doctrine would prevent a Union from intervening in a trustee collection action to protect its own interests. This argument has no merit.

As a final point, Schneider argues that the Eighth Circuit decision conflicts with established labor law because Section 302(c)(5) of the LMRA provides for the selection (or court appointment) of a neutral arbitrator to break a trustee deadlock. This argument, too, falls of its own weight. Clearly, the arbitrator's role here is to free the Trustees from paralysis and ensure that they *will act*.

In sum, neither Schneider nor Prosser have shown that mandatory deferral to arbitration of trustee-initiated lawsuits is required by federal labor law or the *Steelworkers Trilogy*.

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[19] If the arbitration proceeding were in any way defective, fund trustees would claim the right to *de novo* judicial adjudication on the grounds that statutory rights and obligations are involved. *See Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728 (1981).

5. To the extent a conflict exists in the circuits, it is insubstantial.

Prosser and Schneider argue that review by this Court is necessary to resolve a conflict in the circuits. Respondents have already indicated that this conflict is insubstantial, at best, in light of recent decisions of this Court. Nevertheless, Respondents feel constrained to address the "conflicting" cases raised in opposition to the Eighth Circuit's decision: *Central States, Southeast and Southwest Areas Pension Fund* v. *Howard Martin*, 625 F.2d 171 (7th Cir. 1980); *Trustees of the National Benefit Fund for Hospital and Health Care Employees* v. *Constant Care Community Health Center*, 669 F.2d 212 (4th Cir. 1982); and *Central States, Southeast and Southwest Areas Pension Fund, et al.* v. *Central Transport*, 698 F.2d 802 (6th Cir. 1983).

Howard Martin; supra, is the only case in direct conflict with the case at bar. As noted above, this decision is not good law for a variety of reasons and was not followed by the Fifth Circuit in *Bugher* v. *Consolidated X-Ray Service Corp.*, 705 F.2d 1426 (5th Cir. 1983), the first circuit court that had the opportunity of choosing between the approaches taken by the Seventh and the Eighth Circuits.

While the Fourth Circuit in *Constant Care, supra*, did adopt the *Howard Martin* approach in theory, it did not apply it in practice, having determined that the facts before it were "simple" and did not warrant arbitration. Thus, the court refused to dismiss a trustee collection action for failure to exhaust the grievance mechanism of the collective bargaining agreement. Such conflict as exists by virtue of the *Constant Care* decision exists by virtue of dictum and does not justify a review by this Court.

Central States v. *Central Transport, supra*, has nothing to do with mandatory deferral to arbitration. In this case, the Sixth Circuit found that the Trustees of the Central States Funds, when conducting audits, could inspect the records only of those employees the employer conceded

were covered by the collective bargaining agreement unless *the Trustees* had reasonable cause to believe that particular employees were improperly omitted from the bargaining unit and might be entitled to contributions. The court never suggested that an arbitrator could determine the permissible scope of a trustee audit.

Central Transport was decided on January 20, 1983, and the decision was available to the Eighth Circuit before it decided the case at bar on February 16, 1983 (*see* A-23, fn. 7). The Eighth Circuit specifically chose not to follow the Sixth Circuit. (Central States has filed a Petition for a Writ of Certiorari to the Sixth Circuit.)

Ironically, Schneider includes in its Petition (p. 9) the following passage from *Central Transport* in support of its contention that matters of coverage under a collective bargaining agreement must be decided by contractual grievance mechanisms no matter in what context the controversy arises:

> Entitlement to Funds' benefits may be established by a concession amongst the parties that a particular individual is a covered employee or person otherwise entitled to the Funds' benefits. Entitlement may also be established by the judicial or arbitral process where there is no concession that an employee, or one claiming under him or her, is a covered employee.

Schneider omits the citation chosen by the Sixth Circuit to immediately follow this statement: *Barrentine* v. *Arkansas-Best Freight System*, 450 U.S. 728 (1981). In *Barrentine*, this Court found that *collective* bargaining with its spirit of compromise and the duty of fair representation under the LMRA were not necessarily consistent with the vindication of *individual statutory rights*.[20] As the Eighth

[20] In *Barrentine*, this Court held that employees could go to court to vindicate their entitlement to compensation under the Fair Labor Standards Act although a parallel contractual wage claim had been adversely decided by an arbitrator.

Circuit noted: "Although Barrentine involved a different right from those under consideration here, it at least shows that the presumption in favor of arbitration is not, of itself, sufficient to place statutory rights or obligations, such as those imposed on trustees and employers by ERISA and MEPPAA, under the arbitral process. Cf. *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974) (Title VII cause of action not subject to arbitration" (A-15). To which Respondents add: the trustees, in conducting audits and filing collection actions, are exercising statutory fiduciary powers to protect the interests of participants and beneficiaries who *also* have statutory rights which Congress sought to protect.

In sum, neither Prosser nor Schneider have shown that a substantial conflict exists in the circuits justifying review by this Court. On the contrary, only one case, *Howard Martin*, is in *direct* conflict with the Eighth Circuit decision. However, the court's reasoning in *Howard Martin* is not only inconsistent with important principles articulated by this Court in subsequent related decisions; it also conflicts with the rationales of two leading Third Circuit cases mandating trustee independence: *Nedd* v. *United Mine Workers of America*, 556 F.2d 190 (3d Cir. 1977) and *Rosen* v. *Hotel and Restaurant Employees, Local 274*, 637 F.2d 592 (3d Cir. 1981).

CONCLUSION

Mandatory deferral to arbitration of actions brought by benefit fund trustees, whether to collect delinquent contributions or to compel audits of contributing employers' records, is inconsistent with the principle of trustee independence as articulated by this Court and by the courts of various circuits. It is also inconsistent with national pension policy as formulated by Congress in ERISA and the MEPPAA. Established labor law does not require fund trustees to exhaust contractual grievance mechanisms which they did not bargain for *and* to which they do not have direct access. The concerns raised by Prosser and Schneider with regard to the possibility of litigating in two tribunals can be eliminated by negotiating changes in the collective bargaining agreement. To the extent a conflict in the circuits exists, it is insubstantial and will be resolved as a majority view clearly emerges, based on the Eighth Circuit's thoughtful and comprehensive decision. For all of the above reasons, Writs of Certiorari should not be issued and review should be denied.

Respectfully submitted,

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